INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 511

THE PUEBLO OF SANTA ROSA, PETITIONER

v.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND William Spry, Commissioner of the General Land Office

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT COMMISSIONER

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals of the District of Columbia is reported in 12 F. (2d) 332 and is found at page 423 of the record. The opinion of the Supreme Court of the District of Columbia is found at page 90 of the record.

GROUNDS OF JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1926. (R. 431.) A petition for re-

hearing was entertained and denied April 24, 1926. (R. 441.) Petition for certiorari was filed July 13, 1926, and was granted October 25, 1926 under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The order granting certiorari said (R. 442):

> And it is further ordered that this cause be, and the same is hereby, assigned for hearing on January 10th next, after the cases heretofore assigned for that day, on the issue as to the existence of authority of counsel who filed the bill to represent complainant.

Since the only authority claimed is based on a power of attorney signed in 1880, the question presented is whether the power was authorized or valid in the first place, and whether its authority ceased before the suit was commenced by lapse of time or death of those involved.

In this connection the question arises whether certain conveyances by Papago Chiefs in connection with the giving of the power were authorized and valid.

An attempt is also disclosed to establish a ratification by the Indians of the commencement of the suit.

The question is also presented whether the fact of want of authority, if established, was properly raised by the respondent or may be considered by the Court on its own motion.

STATEMENT

Since Albert B. Fall is no longer Secretary of the Interior and the petitioner took no steps in the lower court to substitute his successor, this brief is presented only on behalf of the Commissioner of the General Land Office, the remaining respondent.

The only authority of counsel who commenced the suit to institute it in the name of and on behalf of the alleged Pueblo of Santa Rosa rests on a power of attorney made in 1880 by Luis, a Papago Chief, to one Hunter, as a part of a transaction by which Luis executed a deed purporting to convey to Hunter an undivided one-half of lands in which the Papagos claimed an interest. Hunter, who is dead, made a contract with one Martin by which the latter, in consideration for an interest in the lands so conveyed to Hunter, undertook to prosecute the suit to assert title to the lands as against the United States and to have a partition of the Indians' interest. It is Martin who has employed counsel and caused this suit to be instituted.

The complaint (R. 1) filed January 28, 1915, averred that plaintiff from time immemorial has been a town known by the name of the Pueblo of Santa Rosa; that from time immemorial it has occupied a definite tract of land 24 miles by 30; that under the Spanish and Mexican law it became and is the absolute owner thereof, and that the defendants were offering the land for entry as public land of the United States and should be enjoined from

so doing. No written grant was pleaded and the alleged title depends upon the general laws of Spain and Mexico.

The bill of complaint was signed "The Pueblo of Santa Rosa, By Henry P. Blair, Attorney of Record." Indorsed below was "Rounds, Hatch, Dillingham & Debevoise; Cates & Robinson, Henry P. Blair, Attorneys for Plaintiff."

A motion to dismiss, based principally on the ground that the plaintiff had no right or capacity to sue, was sustained by the trial court and the bill dismissed. (R. 11–21.) An appeal was taken in 1916 to the Court of Appeals of the District of Columbia, which reversed the trial court and ordered a permanent injunction against the defendants. (*Pueblo of Santa Rosa* v. *Lane*, 46 App. D. C. 411.) An appeal followed to this Court, which in 1919 reversed both the lower courts and sent the case back with instructions that the defendants be allowed to answer and that the case be tried on the merits. (*Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110.)

Up to that point the only thing before the courts was the bill of complaint and this Court held that the allegations of the bill if true showed that the plaintiff was a Pueblo with the capacity to sue, and that the bill of complaint showed the Indians had a complete and perfect title. This Court said (p. 114):

> In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what

has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty, but no decision on either point is intended.

When the case reached the Supreme Court of the District of Columbia on mandate from this Court on June 9, 1919, the defendants filed an answer (R. 22) denying the allegations of the complaint, and alleging that there was no such entity as the Pueblo of Santa Rosa, but that Santa Rosa is merely a geographic name describing a large district of indefinite extent, containing various scattered Indian villages; that neither the alleged village nor any Papago village has fee title to the land it occupies or anything but the ordinary Indian occupancy title, which title under the Papagos' own theory belongs to the whole tribe. The answer alleged that the tract described in the complaint, considered as an ascertainable tract claimed or occupied by any Papago village, is a myth; that its boundaries are incapable of accurate ascertainment; that no Papago village as such claims any definite tract of land; that the description in the complaint was taken from one of the various sixteen deeds given by various Papago chiefs in 1880 to one Hunter, Trustee, each purporting to convey one-half interest in a tract of land assumed by the draftsman of the deed to represent the property of the village or group of villages.

The answer further alleged that Hunter, in 1911, contracted to sell three-quarters of his half interest to one Martin of Los Angeles, California, the latter binding himself to secure by suit the segregation of the lands from the public domain, and then to partition them between Hunter, or his successors and the Indians, *"all proceedings to be instituted in the name of the Indian inhabitants of the respective villages named in the deeds."* (R. 26.)

The answer also denied that the defendants were attempting to deprive the Indians of any interest in the land and alleged that the United States was protecting the Indians in the occupation of the district and had created reservations for that purpose.

The answer also alleged that the so-called Pueblo of Santa Rosa had never authorized the suit and that counsel who appeared for it had no authority to represent it, if there were such a pueblo.

Simultaneously with the filing of the answer the defendants filed a motion to dismiss (R. 33), accompanied by affidavits, alleging want of authority from the Indians to institute the suit and the invalidity of a certain power of attorney given on the same date as the deed of 1880, which was the basis of the authority claimed by counsel for instituting the suit in the name of "Pueblo of Santa Rosa." It was set forth in the motion papers that the Solicitor General first learned of this want of authority while the case was in this Court on the first appeal; that he thereupon asked to be informed as to the

authority of counsel appearing for the Pueblo of Santa Rosa, for bringing the suit and in reply was furnished by said counsel with a copy of an alleged power of attorney purporting to have been executed November 8, 1880, by one "Luis Captain of the Village of Santa Rosa—for himself and the inhabitants of said village—" of the first part and the said Hunter, party of the second part, together with a certain instrument in writing dated May 31, 1911, executed by said Hunter appointing one Alton M. Cates, one of the counsel who filed this suit, to the power alleged to be vested in Hunter by the power of attorney from the said Luis.

The motion further averred that no Pueblo of Santa Rosa, as a municipal corporation had ever authorized the suit, that the alleged authority contained in the power of attorney did not purport to be executed on behalf of the Pueblo of Santa Rosa, a corporation, or on behalf of the inhabitants of the Pueblo or corporation, but on behalf of said Luis as an inhabitant of the village of Santa Rosa, and on behalf of the inhabitants of Santa Rosa and three other villages named therein. This motion did not concede the existence of any Pueblo of Santa Rosa but averred that neither the villages named in the power nor the inhabitants of the villages knew of the suit until long after it had been brought and none had authorized said suit, nor ratified nor approved it. Five separate reasons were assigned why the alleged power of attorney and its substitution were void. (R. 33–35.)

26499—27——2

The motion was accompanied by a copy of the letter from counsel for the alleged plaintiff stating that their authority to bring the suit was conferred by the said power of attorney and substitution and that counsel was "advised that the inhabitants of Santa Rosa are cognizant of the fact that the suit is pending and are in sympathy with the result sought to be obtained." (R. 36.)

The motion was also supported by 32 affidavits (R. 40–78), four of which were by Government agents, relating their unsuccessful efforts to find some knowledge of the suit and authorization therefor among inhabitants of the village alleged to constitute the Pueblo of Santa Rosa (R. 40, 43, 46, 48). The remainder were by Papago Indians living in the Santa Rosa region, which showed that after an exhaustive search on the ground no one could be found who had authorized the suit, or who knew counsel who had brought it, or had even heard of its existence until long after it was instituted, or until Government agents brought word of it; and that if any authority to sue had been given, affiants would have known of it, because of their status and the customs of their people. (R. 45, 47, 51–78.)

Proof of the death of Hunter, donee of the power, on February 19, 1912, was filed later but before argument on the motion. (R. 84, 87.)

Counsel for the alleged Pueblo of Santa Rosa filed the affidavits of W. T. Day and C. B. Guittard

(R. 79, 84) to rebut the affidavits filed in support of the motion to dismiss.

Hearing was had on the motion to dismiss the cause, and the trial Court on February 28, 1921, filed a memorandum (R. 87) in which it was said (R. 88):

> The contentions on behalf of the motion to dismiss take a wide range and at points may be said to reach the merits of the case. Were it granted an appeal would no doubt follow, and if on appeal the order of dismissal was reversed the parties litigant would be no nearer a final determination of the rights asserted in the Bill of Complaint than they were when the case previously began its appellate course.
>
> The case is one which, it seems to the Court, calls for a complete judicial investigation and a final determination, especially in view of the careful consideration given to it heretofore by the appellate tribunals, and it would be unfortunate if it were now to go off on a question of a want of authority to institute the present proceeding. And yet grave reasons have been presented in support of the pending motion that should not lightly be brushed aside, or disposed of at this time. Nor need they be.
>
> The defendants have answered the Bill of Complaint and a final hearing can take place in which all contested matters, or such of them as the Court may consider necessary for a just determination of the case, can be adjudicated. If this course is taken, it will not deprive the defendants of the right to

> press the grounds set up in support of the pending motion, and it will be in harmony with the directions of the Supreme Court in sending the case back to this Court.

The court then concluded (R. 89):

> The decision on the motion to dismiss will be postponed until the final hearing of the cause * * *.

An order was filed April 15, 1921, postponing decision on the motion until final hearing of the cause. (R. 89.)

Counsel for the alleged plaintiff Pueblo and the defendants thereafter proceeded with the taking of testimony which, on the hearing of the cause, was duly presented to the trial court.

This testimony, by depositions and certain documentary evidence, occupies pages 114 to 422 of the Record. Examination thereof will disclose that many of the Papagos, whose affidavits were filed with the motion to dismiss, were examined and cross-examined, as were many others, and that, throughout the entire record, testimony concerning the authorization of the suit, and knowledge thereof or its ratification, was taken along with testimony directed to issues raised exclusively by the answer.

This testimony clearly disclosed the origin of the power of attorney relied on by counsel for the alleged plaintiff and further disclosed that one Martin was the real party responsible for this suit, and that its object was hostile to the interests of the alleged Pueblo and of the Papagos individually.

It was shown that, as early as 1874 a controversy existed between the Right Reverend J. B. Salpointe, Roman Catholic Bishop, of Tucson, Arizona, and agents of the Indian Bureau sent to the Papagos country to look after the Indians in connection with reservations then created, and including San Xavier Church and schoolhouse. (R. 226–229.) The agents charged the Bishop with oppression of the Indians and activities directed to their enslavement, and the acquisition of certain of their lands, and opposed what they regarded as acts by the Bishop to that end. (R. 228–230.)

The details of this controversy down to the winter of 1880 are not clear, but in December, 1880, identified by many witnesses by reference to "the year the railroad came to Tucson," a meeting was held at the house of Bishop Salpointe, at which the Bishop was present for a short time. Robert F. Hunter, of Washington, D. C., claiming to represent the Catholic Missionary Society, was present at this meeting, as were Santiago Ainsa, a notary public; several residents of Tucson as witnesses; a Mexican woman, one Teodora Troiel, who assumed to act as an interpreter; and a number of Papagos, who, except one Ascension Rios, Chief of San Xavier (R. 285), remain unidentified unless by the signatures to certain deeds and powers of attorney there executed.

The circumstances surrounding this meeting, and others at which similar deeds and powers of attorney were executed would rest in obscurity except

for the testimony of Ainsa, the notary, the only person living who was present when the deeds and powers of attorney were executed. Special attention is invited to his testimony. (R. 276–298.)

Ainsa was then 40 years of age and an attorney at law, practicing at Tucson. He donated his services as notary at the request of Bishop Salpointe and Hunter, who represented that the latter was arranging to protect the interests of the Indians in the lands they had and wished the deeds or instruments executed "for the benefit of the Indians and for the church in part." (R. 277.) There were apparently several meetings at which deeds and alleged powers of attorney were executed. Two such meetings were at the house of the Bishop, at Tucson; one or more others at San Xavier. Ainsa acted as notary at each.

On the first occasion, Bishop Salpointe was present. There was a roomful of Indians, "the Bishop came in and he explained to them, then he retired." (R. 277.) Hunter was present and in charge of all subsequent proceedings aided by the Mexican woman interpreter. All seemed prearranged. (R. 277, 278, 286, 289, 297.) The deeds and powers were made out before these meetings and apparently carried the name of the Indian who purported to sign the deed or power, and each Indian, upon something being said by the Mexican woman, Troiel, appeared to Ainsa to acknowledge the name signed to the particular instrument before him, as his own,

and either then made their mark or were made by the interpreter to appear to confirm a mark already made. (R. 277, 286, 289, 293–5.) None could write his name. (R. 294.)

Ainsa was a Catholic and acted unquestioningly through belief in the integrity and good purposes of the Bishop and Hunter. The Papagos, also generally Catholics, were under the influence of the Bishop (R. 149) and seemed to act from the same trust as Ainsa, and not through any comprehension of the import of the papers which they signed but merely in the belief that by signing the papers presented to them their interests would in some manner be advanced. (Ainsa, R. 227, 285, 288, 289.) "It was the Bishop that we obeyed, they to make the grant and I to certify to it." (Ainsa, R. 297.)

The evidence is conflicting as to the ability of the interpreter, Teodora Troiel, to speak Papago as well as Spanish. Certain of her neighbors testified that she could not speak Papago. (R. 299, 381, 382, 383, 386.) Certainly she neither spoke nor understood English, the language in which the deeds and powers of attorney were written. (Ainsa, R. 286. Castillo, R. 383.) This fact is undisputed. It seems reasonable to conclude from the conflicting testimony (R. 295, 299, 381, 382, 383, 386) that this Mexican woman spoke only a few words of Papago, just as the Papagos who spoke any Spanish possessed only a few words and idioms sufficient to enable them to be understood, by Mexicans, on ele-

mentary, everyday matters about them. Certainly these Papagos could not carry on a conversation in Spanish and none of them spoke or understood English. (R. 285.)

A leading figure in this transaction, if the deeds and powers are correct, was one Con Quien, sometimes styled Coon Can by white men, who also, on this occasion, used the name Jose Maria Ochoa. This Papago is made to appear in one deed as head chief of all the Papagos. That he was self-appointed to this position, or assumed it for the purposes of the occasion of granting the lands of *all* the Papagos, as an apparent precaution on the part of Hunter and the Bishop, was established beyond doubt. Papagos who had known him repeatedly denied that he held such a position. (Jose Pablo, R. 306–7; Blain, 315–6; Bailey, 321–2; Marcos, 333; Wilson, 341, 343; Cachora, 344; Sam Pablo, 346; Lopez, 347; Ignacio, 358; Paoli, 361; Kisto, 363; Castro, 370; Jose Juan, 371; Luciano, 372; Barnebe Lopez, 377, 379; Aragon, 380; Castillo, 382; Norris, 393–4; Santeo, 399.)

Others stated that Con Quien was a good talker and used to give advice to other chiefs of villages whom he called to him and who relied upon him. (Geronimo, 312–3; Nacho, 317.) This power to call other chiefs in conference rested in any chief learning of a matter of general interest. (Lopez, 376; Nacho, 317.)

At the meetings referred to 16 deeds to Robert F. Hunter, Trustee, were drawn and acknowledged

(as related by Ainsa) by various Indians. Each of these deeds purported to convey an undivided half interest in described tracts alleged to be the lands, grants, and privileges owned by the villages named therein. The fields under cultivation at the time of execution of each deed were specifically excepted from the operation thereof. (R. 278–285.) No description of the area so excepted appeared in the deeds.

The alleged grantors signed as headmen or captains of the villages. As to nine of these conveyances Con Quien assumed, or was made by the managers of the puppet show to appear to assume to act, with authority, in lieu of eight absent chiefs. (R. 278–282.) He joined as cograntor in some of the remaining deeds, and using his alleged Spanish name of Ochoa, professed, in a final deed, to convey as chief of all the Papagos an undivided half interest in *all the Papago lands* in Arizona, comprising practically everything south of the Gila River, west of the Santa Cruz River, to the Mexican boundary, and as far west as the junction of the Gila and Colorado Rivers, including 25,000 square miles of territory, this being about half of the area in the Gadsden Purchase. (R. 284.)

Among these deeds was one from "Luis, Captain of the village of Pueblo of Santa Rosa, in the territory of Arizona, for himself and the inhabitants of said village and the villages of Aitij, Semilla-quemada and Chaquima." The description in the com-

plaint was plainly taken from, and repeats almost verbatim, the description in this deed. (R. 3–4, 278–9.)

Each of these deeds was accompanied by a power of attorney to the said Hunter made by the same grantors as in the corresponding deed. The power from Luis (R. 282–4) is that upon which counsel assumed to bring this suit.

The power purported to be given by "We, Luis, Captain of the village of Santa Rosa—for himself and the inhabitants of said village—" and recited that he was duly authorized and empowered to make, enter upon, and execute contracts; issue, make, and acknowledge powers of attorney and do other legal acts to bind and obligate the inhabitants of the said village of Santa Rosa.

This power was sweeping in its provisions and authorized Hunter "to represent and prosecute in our name, or the names of the said inhabitants of said village" before all branches of the Government, or wherever necessary, "any and all matter of difference, contest or dispute that may attend or arise in the course of settlement, adjustment, determination, compromise or recognition of our title, claims and demands, whether at Law or Equity, and of whatsoever nature, to and for certain grants or tracts of land situate in the said territory the title to which is vested in us or said inhabitants." The attorney was empowered to take whatever action he should deem necessary to accomplish the purposes enumerated, with full

power and authority to adjust or compromise all claims and demands, *and to receive a money equivalent for lands conveyed, "the amount to be satisfactory to our said attorney, and to be by him determined."* The power also recited:

> Hereby granting to our said attorney full powers of delegation, substitution and revocation. And as this power of attorney is accompanied with an interest vesting in our said attorney, for a valuable consideration, it is hereby made irrevocable.

In this power, as in the deed from Luis, plural pronouns "we", "us", and "our" appear repeatedly, disclosing the conception of the draftsman of these papers that the headman was a petty monarch with plenary power over the Indians and the lands occupied by them.

The conveyances were without consideration, unless there be implied some undertaking on the part of the grantee to perform some service in establishing claims of the Indians.

In 1881 Hunter attempted to represent the Papagos before the United States Surveyor General of Arizona. That officer pursuant to the Acts of July 22, 1854 (c. 103, 10 Stat. 308, 309), and July 15, 1870 (c. 292, 16 Stat. 291, 304) had primary jurisdiction to inquire into and make findings of fact concerning the rights of Indians in Arizona under the Gadsden Treaty. The controversy which ensued is fully shown in the Record. (230–244.)

It is shown that Hunter secured the suspension of action on the mineral entry for the Santa Tomas

mine to permit examination by the Surveyor General of "the evidence of a Spanish or Mexican grant for pueblo or village purposes" in favor of the Papago Indians and conflicting with the mineral application. (R. 230.) At the same time Hunter, who signed as attorney for the Papagos, applied for a similar examination of a like alleged title to lands claimed by sixteen named Papago villages. (R. 235.)

The Surveyor General at once questioned the authority of Hunter to represent the Papagos, pointing out that a delegation of Papago chiefs had appeared before him in their own behalf, accompanied by an interpreter, advancing a claim to certain lands at San Xavier del Bac and were heard, but at no time intimated that they had any counsel or attorney to represent them. The Indian claims on that occasion were taken up by the Surveyor General with the United States agent for the Papago Indians, as their representative. (R. 233.)

In dealing with Hunter, the Surveyor General expressed complete readiness to conduct the investigation sought if Hunter would either produce the chiefs concerned in person or their Indian agent and have them advise that they constituted Hunter their attorney, or else present a letter from the Indian agent, the Commissioner of Indian Affairs, or the Secretary of the Interior to the effect that Hunter was actually recognized as attorney for the Papagos. (R. 238.) Hunter persistently eluded

this reasonable requirement, urging that he should be recognized, first, because the Commissioner of the General Land Office had stated that the files of that office showed that he appeared of record as attorney for the Papago Indians in the matter of the Santa Tomas mine application (R. 234, 237), and, further, because he was a practicing attorney at law and should be presumed to have authority to represent his alleged clients. (R. 239.)

The Surveyor General insisted upon compliance with his requirements, fortified therein by his general practice in such cases (R. 240) and especially insisted upon in this instance because of information given him by Ainsa, the notary public, that one Hunter, believed by the Surveyor General to be R. F. Hunter, had in 1881 secured 100 deeds to himself from a number of Papago and Pima chiefs. (R. 242.) Hunter never complied or attempted to comply with the requirement of the Surveyor General and after a discussion lasting from March, 1881, to September, 1882, a patent for the Santa Tomas mine was issued. (R. 244.)

In 1903 Hunter by letter to the Secretary of the Interior made the same claim of ownership of lands in the Papago country as is urged in this suit. The Secretary, noting a possible lack of authority in Hunter to present the questions, declined to entertain this claim, expressing the view that the Indians' rights were those of occupancy only. (R. 244–6.)

In 1910, one Brown, a distant relative of Hunter, visited the Papago country with a new set of powers of attorney, confirming the powers given to Hunter in 1880, and setting forth an agreement for the partition of the lands around ten Papago villages. Hugh Norris, a Papago Indian, was engaged to secure the names of the oldest chiefs in each village to these instruments and was promised $100 for each signature so produced. Norris was unable to secure any signatures, as the Indians had never heard of the earlier powers, disbelieved the whole scheme, and refused to seriously consider it. (R. 142, 337, 382, 390, 394–5, 397–8.)

In 1911 two contracts were made by Hunter with one R. M. Martin, of Los Angeles. (R. 246–250.) The contract of May 17, 1911, is the important one, as therein Hunter arranged with Martin *the segregation from the public domain of the United States* of lands described in 10 of the deeds executed in 1880, to Hunter, *trustee,* and *to secure the partition of said lands* between Hunter and his successors and the Indians. Martin, in consideration for these services, and certain cash payments, was to be conveyed an undivided three-fourths interest in the lands partitioned to Hunter, and was to have an option to purchase Hunter's remaining one-fourth interest for $250,000. (R. 248–9.)

This contract further provided:

> All proceedings for the segregation of said respective tracts of land from the public domain of the United States are to be insti-

> tuted and conducted in the name of the Indian inhabitants of the said respective villages or pueblos under and by virtue of the several empowerments to Robert F. Hunter, as evidenced by the general powers of attorney are herein and hereby referred to as a part of this agreement, and said Robert F. Hunter hereby agrees on demand of the party of the second part hereto to delegate to the counsel of the party of the second part power and authority under the provisions of the general powers of attorney, made and executed to him for the Indian inhabitants of said villages, respectively.

It will be noted from these contracts that although Hunter took whatever rights the deeds of 1880 conveyed *as trustee* for secret or undisclosed beneficiaries, these contracts of 1911, though signed by him *as trustee* deal with the property as that to accrue to him in his own right, and upon his death, pursuant to the terms of his will, a distribution was directed to be made to members of his family of the present and contemplated proceeds of the Martin contract. (R. 251–252.)

On May 31, 1911, Hunter executed a substitution of the powers of 1880 including the Luis power to Alton M. Cates, of the firm of Cates and Robinson, which signed the complaint as attorneys for plaintiff. (R. 9.) This attempted substitution was more than 31 years after the original power was executed. (R. 98.) Cates claimed no interest in any of the lands and there can be no doubt but that he secured

this power as attorney for Martin, pursuant to the contract of May 17, 1911. (R. 249.)

Long prior to the entry of Martin and Cates into the matter, Luis, the apparent donor of the power, had died. (R. 97, 252–3, 360, 371.) Hunter died February 19, 1912 (R. 85), and Alton M. Cates died November 23, 1920 (R. 252). Thus the donor of the alleged power died before anything was attempted under it; the donee died before this suit was brought; and the substituted donee died before the hearing of the case on the motion challenging authority for the suit and on the merits. (R. 90.)

The Santa Rosa deed of 1880 was recorded in Pima and Pinal Counties, Arizona, on June 2 and June 8, 1914, *nearly thirty-four years after its alleged* execution. (R. 280.) The other deeds have been similarly recorded at dates varying from thirty-four to thirty-nine years after their execution. The county seat of Pima County is Tucson, where the deeds were executed. No evidence explanatory of the delay in recording these deeds has been offered.

On May, 18, 1914, Rounds, Hatch, Dillingham, and Debevoise, lawyers of New York, who later appeared for the alleged plaintiff in this suit (R. 9, 93, 214) presented to the Secretary of the Interior a petition making claims identical with those in the complaint, on behalf of certain communities including Santa Rosa. In this case reference was made

to "our client R. M. Martin, Esq., of Los Angeles, Cal., who has a large interest in the tracts of land in question, under a contract with Col. Hunter." (250–1.) Martin also admitted to an agent of the United States that he had employed Cates and Robinson and the New York firm to conduct the litigation required by his contract with Hunter. (Bowie, R. 265.)

Martin, after his contract with Hunter, proceeded to advertise and sell for $1,000 each, units or chances, in the possible proceeds of the contemplated litigation, sending one C. B. Guittard, an employee, over the area on several occasions, the first trip being in 1911. (R. 82–3, 388–9.)

Unceasing efforts were made by Government agents from 1918 to 1922 to ascertain from the Indians whether they had any knowledge of a suit, instituted or contemplated, concerning lands which they claimed and whether such a suit had been authorized by the council of any village or any of its inhabitants. These inquiries included mass meetings or councils of the Indians not only from the Santa Rosa district but elsewhere. While a few Indians were found who had heard of the proposed suit, apparently from Martin's representatives, none had authorized it or knew anything about it. (R. 403.) These meetings, held after 1918, included inquiries concerning the alleged transactions of 1880, yet no Indian was found who had heard of the meeting at Tucson, or of the

of the Pueblo of Santa Rosa (R. 326–328, with map).

The evidence heretofore summarized bearing exclusively upon the deed and power of attorney cited as authority for this suit by the attorneys using the name of the alleged Pueblo, was interwoven with other evidence bearing on the issue as to whether there was and is in fact a Pueblo of Santa Rosa; whether, if such a pueblo exists, it claims, or has title to the lands described in the bill of complaint, or any of them; and whether such a claim is founded upon any grant or concession either from the kingdom of Spain, or from Mexico, and whether the defendants had taken any action or were threatening to take any steps in disregard of or injurious to any valid claim or title which the alleged pueblo now has.

While the only question now being considered is the authority of counsel, that authority depends on the deeds and powers of 1880, consideration of the validity and effect of which requires an understanding of the circumstances of the Papagos.

The history and status of the Papagos under the sovereignty of Spain and Mexico were shown by excerpts from accounts of early explorations throughout the Papagueria or Papago country, and by books and public documents of Spanish and Mexican origin. (R. 183–226.)

Both Spaniards and Mexicans had all they could do to maintain themselves against hostile Indians,

among whom the Papagos were from time to time classed, except when there was joint action against *the common foe, the Apache. The visitadorgeneral* (R. 223) twice recommended the removal of the Papagos. The names given on the maps of Kino and others did not designate prosperous Spanish missions and settlements, but merely Indian rancherias (R. 220–1). The Papago villages "were but hamlets compared with those of their southern brethren." "They could scarcely be called village Indians." They "were shunned and feared." They "roamed over rather than resided in the southwestern corner of Arizona." (R. 224–5.)

No written grant, or concession from Spain or Mexico was produced, nor was it shown that such a formal grant or concession had ever been made, recorded, and thereafter lost. Title by prescription was the most that was suggested.

Certain public documents which were judicially noticed by the Court of Appeals when the case was first before it (46 App. D. C. 411) were introduced at the hearing of the case. These with others were reports to the Commissioner of Indian Affairs or to the Congress concerning the Papagos and commenced about 1856, which was shortly after the acquisition of the Gadsden Territory. (R. 163, 188, 193.) In addition excerpts from books written about the Papagos were introduced. (R. 189–191, 193–6, 197–8.) These stated in substance that the Papago Indians, as of 1856 and before, were a

peaceable tribe living in small villages, engaged in raising wheat, corn, cotton, and vegetables, and having houses and flocks. Certain of these stated that the houses were of adobe construction similar to those of the Pueblo Indians of New Mexico.

Deposition testimony of a large number of living Papagos disclosed their tribal life, the character of their villages, and the claim which they assert to the lands involved and other lands generally thoughout the Papago country. Testimony of the Indians, whether introduced by the plaintiff or by the defendant, disclosed substantially the same facts. Several of the witnesses were over 80 years of age and many others were from 45 to 65 years old, so that their testimony from actual knowledge related to conditions existing long prior to 1880 and prior to the creation of reservations of the lands which they occupied.

The territory known as the Papago country is arid and the only permanent sources of water are to be found in or near the foothills of small mountain ranges. The Indians farm and raise livestock, which requires that in the winter they occupy villages in the foothills where there are permanent sources of water for their stock, and in the summer they move to small villages in the valleys, where moist ground suitable for cultivation is found. These villages are mere clusters of huts. Formerly almost all the huts were made of grass or poles, occasionally having thatched roofs

covered with mud. Adobe houses are a matter of recent development. (R. 158, 160, 304, 318, 320, 334, 342, 343, 347, 348, 352, 361, 371, 372.) These houses with repair lasted from 5 to 20 years. (R. 304, 320, 334.) Under an early custom a house was burned if a death occurred therein. (R. 304–5, 334, 373, 394.)

The villages have no definite limits (R. 160, 161, 338), and the houses are located without any definite plan in contrast to pueblos of permanent construction (R. 339, 352). No village claims any definite tract of land. (R. 303, 319, 321, 347, 373.) The only claim of ownership known was as to fields under cultivation and Papagos could take fields wherever vacant. (R. 161, 303, 311, 315, 316, 318, 319, 340, 343, 345, 348, 373, 378.) Nor was it necessary that consent be secured from the chief or headman of the village near which the field was located. (R. 161, 346, 348.) A field once taken for cultivation remained in the family until abandoned, passing from father to son. (R. 158, 160, 161, 303, 307, 311, 315, 318, 319, 333, 341, 343, 348, 349.)

The field was, however, apparently not regarded as salable, for no Papago was ever known to sell a field. (R. 160, 318, 341, 353, 369.) Cattle roamed at will throughout the Papago country and were not confined to any zone, through a view that said territory was in any wise appurtenant to the village in which their owner resided. (R. 160, 161, 303, 306, 319, 321, 333, 341, 343, 345, 348, 357.) On the contrary, the view of the Indians was that the Pa-

pago country belonged to all the Papagos and was free to use by them wherever unappropriated. (R. 158, 161, 162, 163, 307, 322, 344, 347, 357, 373, 378, 383.)

Each village had a chief or headman (R. 162, 311, 336, 344, 346), but there was no fixed procedure for selecting a chief (303, 304, 317, 346). Matters of importance were invariably taken up by the chief with the inhabitants of the village assembled in council, but there was no special board or group consisting of designated council members. (R. 162, 304, 311, 318, 319, 353–4, 357.) In the early days there was possibly some organization of the Indians with tribal recognition of one Indian as head chief, but such an arrangement had not existed within the memory of living Papagos. (R. 342, 344, 347, 361.) Con Quien was the only Indian known to have assumed such title, and his authority was generally denied. (R. 312, 315, 317, 322, 341, 344, 346, 375, 379, 380.)

No chief or headman could sell land belonging to the Papagos. (R. 158, 159, 304, 311, 318, 323, 333, 341, 343, 357, 369.) Such a matter would have required consideration by the Indians assembled in council (R. 158, 159, 311, 333, 344, 369, 372), and no sale of land by such a procedure had ever been known (R. 322, 323, 341, 344, 369). Similarly, authority to bring a suit in the white man's court would have required consent of the Indian council. (R. 311, 345, 351, 369.)

While the Indians claim to own as a tribe all the lands in the Papago country and had, prior to the creation of Indian reservations, asserted that right for themselves, they relied upon the Government to exclude white men and to keep them in the enjoyment of their lands as had been their custom. (R. 311, 313, 321, 323, 342, 347.)

Santa Rosa is a name applied to a locality or district, flanked by the Santa Rosa mountains, and the villages therein are known as Santa Rosa villages. (R. 145, 306.) No single village of Santa Rosa was known until about 1917 when a Government school was established at Kaicheemouck, and referred to as Santa Rosa. (R. 302, 339, 392.) Each village had an Indian name, while "Santa Rosa" was a Spanish term used by Papagos to designate the locality in talking to Mexicans. (R. 159, 160, 301–2, 347, 352, 361, 373, 375, 388, 392.) The specific villages within this district which were collectively referred to as "Santa Rosa" were the subject of conflicting testimony. One white witness named Kaichumuck, *Achi,* Kivibo, and Iloitak. (R. 324–5.) Another said Kaichumuck, Achi, Akchin, Makumavais, and Quewa. (R. 258.)

Plaintiff's counsel adopted Kiacheemuck, Achi, Anegam, and Akchin as the villages making up "the Pueblo of Santa Rosa." (R. 161, 162.) The deed and power from Luis named the village of Santa Rosa and the villages of Aitij, Semilla-quemada, and Chaquima. (R. 278.) One of the 16

deeds given to Hunter, trustee in 1880, was by Con Quien signing as Jose Maria Ochoa, for lands around the village of Kakachemouk. (R. 281.) This clearly referred to "Kiacheemouck," and seemed, so far as could be found, to intend to describe lands which were largely covered by the deed from Luis. Similarly a deed on behalf of the inhabitants of "Anaca" referred to Anegam and related to lands described in the Luis deed. (R. 327–8 and map.)

Taking Kiacheemuck, Achi, Anegam, and Akchin, as the group most generally embraced by the term "Santa Rosa," it was found that these were valley or summer villages, from which in winter or dry weather the inhabitants removed to mountain villages, generally occupied by the same people as inhabited a corresponding summer village. (R. 160, 161, 302, 307, 361, 363.) Each of these villages had its own chief, and the inhabitants met in separate councils on matters affecting the village alone. (R. 162, 346, 348, 349, 351, 357, 365, 370, 387, 391, 393.)

. None of these villages nor the group ever claimed ownership of any lands to the exclusion of Papagos from other villages. (R. 303, 347.) Nor did Luis, who was headman at Achi, ever assemble his village or the others of the group in council concerning his alleged transfer of an interest in the lands in 1880, nor concerning his attempted appointment of R. F. Hunter as attorney for them. (R. 357, 361, 363, 372.)

The evidence showed that the Government has made no attempt to deprive these Indians of any interest in these lands but on the contrary it has carefully protected and assisted them. The position of the United States and its authorities has been that these lands are public lands of the United States subject to Indian occupancy and possession, a right which has been carefully guarded. Government agents have supervised the affairs of the Papagos since 1858. Appropriations for Arizona Indians to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life and for general purposes have been made annually from 1864 to the present time in ever-increasing amounts. (13 Stat. 180, 559; 14 Stat. 279, 512; 15 Stat. 219; 35 Stat. 75, 786; 36 Stat. 272, 1062; 41 Stat. 1232.)

In 1912, 1913, and 1914 appropriations were made for the development of water supply for domestic and stock purposes and " for irrigation for *nomadic* Papago Indians in Pima County, Arizona." In 1914 the sum of $50,000 was appropriated for Papago schools. (38 Stat. 584.) A hospital is maintained at Sells. In each of the years 1914, 1916, 1917, and 1918 the sum of $20,000 was appropriated for pumping plants, tanks, and water supply for eight Papago villages. In 1919 the sum of $10,000 was appropriated to fence the boundary between the main Papago reservation and Mexico (40 Stat. 569), and $52,000 for maintaining waterworks and con-

structing new wells at seven more villages (41 Stat. 10). Many other appropriations for similar purposes were made between 1874 and 1912; seven reservations were created for the Papagos by Executive order (R. 20), and in 1916 a reservation of about 2,800,000 acres was set apart (R. 28).

In 1917 this was reduced on petition of the Arizona Legislature and other bodies to 2,443,000 acres by taking out a strip from East to West through the center in order to leave a passage for persons and cattle. This reservation was made on the petition of the Papagos themselves and now covers most of the Papago country. (R. 304, 308.) Almost all of the Indian occupancy is therefore protected by the reservation and any part lying within the withdrawn strip is protected by the general rule announced by the Department of the Interior to grant no title to public lands in Indian occupancy. (R. 271, 274.)

Upon consideration of the matters herein set forth the Supreme Court of the District of Columbia filed an opinion (R. 90) ordering the dismissal of the bill. In this opinion the court said, as to the motion to dismiss (R. 91):

> The questions of fact raised by the motion were the subject of considerable evidence, pro and con, adduced at the final hearing, and claimed applicable rules thereto invoked and argued, and separate briefs dealing with this phase of the case were submitted.

> It is clear, in the opinion of the Court, that the grounds of the motion and the opposition thereto, were sufficiently developed in the trial of the case on the merits, to admit of a determination of the questions raised thereby, in the conclusions which the Court has reached on the whole case as presented by the pleadings and evidence, and which are the basis of its decision, and that therefore the motion to dismiss should be overruled.

The remainder of the opinion deals with the source of authority for this suit, the Court *"assuming but without deciding"* that the plaintiff named is a pueblo or municipality, and *"assuming but without deciding"* that it owned and held the lands in common for its inhabitants found that the alleged plaintiff had never authorized the suit, and "did not possess under any law, Spanish, Mexican or United States, or by any custom, usage or tradition, the power" to make the conveyance or grant the power of attorney attempted to be made by Luis (R. 99–100) and which were found to be the basis for this suit, which was brought by and for the benefit of Martin and those claiming by or through him (R. 98–99).

The decision being favorable to the defendants, no appeal was taken by them from the action of the court in denying the motion to dismiss, although the reasons advanced by the court were all directed to matters raised by the motion.

An appeal was taken in the name of the alleged plaintiff pueblo, and was duly allowed by the Court of Appeals for the District of Columbia.

The Court of Appeals in its opinion (R. 423) ruled that the question of authority to bring this suit had been raised in an improper manner, and in addition came too late. On the merits the court, without, so far as the opinion discloses, considering whether the Papagos were in any wise different from recognized Pueblo Indians in New Mexico, held that these Indians had a prescriptive right to the lands involved, which was "subject to recognition by the Government of Mexico," but which, by reason of its never having been recorded, was barred from recognition by the United States because of the provisions in the sixth section of the Gadsden Treaty. The decision below was affirmed.

Again the defendants were faced with an opinion which found important facts and the law squarely contrary to their contentions and beliefs, but which directed that the suit be dismissed, and, of course, no steps seeking a review of the opinion were or could properly have been taken.

This Court in granting certiorari (R. 442) set the matter down for hearing "on the issue as to the existence of authority of counsel who filed the bill to represent complainant."

SUMMARY OF ARGUMENT

The claim of authority of counsel to file this suit rests on the power of attorney signed in 1880. If

that power was void or expired before this suit was commenced, the suit was brought without authority. If the power was revocable, it terminated before the suit was commenced by death of the attorney in fact and by lapse of time, and if there could be any question about that, it would be disposed of by the document filed in the court below signed by the Papago Indians repudiating the power and requesting dismissal of the suit.

The only claim ever asserted that the power was irrevocable is based on the deed from Chief Luis to Hunter in 1880 of an undivided half of the Indian lands. That deed was void because signed without intelligent consent, and under circumstances amounting to fraud; because the Chief who signed it had no authority from the Council of the Tribe; and because it was prohibited by two statutes, one prohibiting agreements by Indians for the payment or delivery of money or anything of value in consideration of services relative to their lands unless approved by the Secretary of the Interior, and the other forbidding any purchase or grant of lands from any Indian Nation or tribe, except under conditions not here complied with.

The want of authority was properly raised by the respondent in the trial court, and, in any event, would be acted on by the court on its own motion.

ARGUMENT

I

AS AN IRREVOCABLE GRANT OF AUTHORITY, THE POWER TOGETHER WITH THE DEED ACCOMPANYING IT WERE VOID

The claim of authority for counsel to institute this suit in the name of the Pueblo of Santa Rosa is grounded on the power executed in 1880 by Chief Louis to Hunter. If that power did not authorize the commencement of this suit in 1915, there was no authority for it. If the power was revocable in its nature, the authority to grant it terminated long before the commencement of the suit. The power ran to Hunter. Hunter assumed to substitute Cates. He also made a contract with Martin, granting Martin an interest in the lands, the latter contracting to take steps necessary to establish the Indian title as against the United States and then to partition the land between the Indians and Hunter and his assigns. It is Martin, under the alleged authority granted by Hunter, who, in turn, acted under the supposed authority of the power of attorney of 1880, who employed counsel and directed the institution of this suit.

It is elementary that a power revocable in its nature terminates on the death of the agent named. It is also clear that if the power was revocable in its nature, its authority lapsed through failure to exercise it for an unreasonable period of 35 years. If revocable in its nature, even though in force when

the suit was brought, its authority was ended when 181 of the 195 adult male inhabitants of the Indian villages involved signed a document, filed in court, repudiating the power and asking dismissal of the suit. Indeed, no serious claim could be made that any authority existed for the commencement of the suit unless the power, in connection with the deeds made at the same time, was irrevocable.

The attempt of counsel to find authority for the institution of the suit in the knowledge and acquiescence of the Indians since it was commenced is so unsubstantial and so entirely unsupported by evidence as not to justify consideration. The trial court found that "By the clear weight of evidence on this point, it is apparent that there was practically no knowledge at all of the institution of this suit by the Papago Indian inhabitants of the region in question, until long after it had been instituted, and no evidence that they ratified the act." (R. 99.) When called upon to disclose their authority in the first instance, counsel pointed to the power of 1880 and the deeds in connection therewith as their sole warrant, and the record discloses no other possible ground on which the authority could be based.

It is not worth while to take space to examine the technical rules relating to powers coupled with an interest.

Any contention that the power in this case was irrevocable must be based on the conveyance of 1880 by Chief Luis to Hunter of an undivided one-

half of lands alleged to be claimed by the Indians. There are many plain reasons why that conveyance was void.

In the first place, it was executed under circumstances showing a lack of intelligent consent by the ignorant Indians who signed it, and it was so entirely improvident that it could not be sustained in any court of law or equity. The circumstances attending the execution of these papers have been as fully inquired into in this case as they ever can or will be, and on the record, as it stands, no court could hesitate for one moment to treat the conveyance as obtained by fraud and imposition. The deed purported to convey an undivided one-half of all the lands the Indians occupied or could claim. It was wholly without consideration, except for such agreement on the part of Hunter as may be implied that he would take the necessary proceedings in behalf of the Indians to establish their claims.

Another reason for the invalidity of the conveyance is found in the want of authority of the Chief who signed it. Whether there be a legal entity or Pueblo of Santa Rosa, or merely a tribe of Papagos, the result is the same. The evidence establishes conclusively that no Papago Chief had authority to do any act or take any step as vital to the interests of the Indians as a conveyance of an undivided one-half of the lands occupied by them without authority from a Council of the Tribe, and the evi-

dence is practically conclusive that no such Council was ever held and that no such authority was ever given.

Another reason for the invalidity of the attempted conveyance is that it was prohibited by statutes of the United States.

The Papagos have been continuously treated as wards of the Government by the legislative and executive branches. Even if Santa Rosa be a Pueblo, the United States may regulate or prohibit the conveyance of its lands. *United States* v. *Candelaria,* 271 U. S. 432.

Section 2116 of the Revised Statutes reads as follows:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Section 2103, Revised Statutes (Sec. 3, Act of Mar. 3, 1871, c. 120, 16 Stat. 544, 570, as amended) provides:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians rela-

> tive to their lands, * * * unless such contract or agreement be executed and approved as follows:

Here follow conditions that it shall be in writing, that it shall be executed before a judge of court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, and that it shall comply with various other conditions. None of these was fulfilled in this case.

The power of attorney seems to have been at one time exhibited to the Interior Department and a Chief Clerk of the Department approved it as to form. There is nothing in the record to show that the Interior Department then or thereafter knew of the deeds or that Chief Luis had not received authority from a Council of the Tribe. There is no suggestion that at the time of the execution of this power and of the conveyances accompanying it the Papagos were citizens of the United States.

The whole case is well summarized in the opinion of the trial court (R. 90–100), whose findings are amply supported by evidence.

II

THE QUESTION OF COUNSEL'S AUTHORITY WAS PROPERLY RAISED IN THE TRIAL COURT, AND, IN ANY EVENT, MAY BE CONSIDERED BY THE COURT ON ITS OWN MOTION

The Court of Appeals seems to have misunderstood the proceedings in the Supreme Court of the District. The method of raising the question as

to the authority of counsel suggested as appropriate by the Court of Appeals was, in fact, followed. It is true that before raising the question the defendant interposed a motion to dismiss grounded on the insufficiency of the complaint. (R. 11.) It took no other step before challenging counsel's authority. When the case was remanded to the Supreme Court of the District, with leave to the defendant to interpose answer, it immediately filed a motion, supported by affidavit, for dismissal of the suit on the ground that counsel had no authority from the alleged Pueblo to institute it. (R. 33.) The necessity of issuing a rule to show cause was dispensed with because counsel appeared in opposition to the motion and argued it.

If there was error in deferring the final consideration and decision of the motion until after hearing on the merits, it was not the fault of respondent, but the action of the trial court (R. 87–89); and since the question of the validity of the power of attorney and the giving of conveyances was so closely interwoven with the circumstances and organization of the Papagos, and the question whether there was a Pueblo or legal entity, the trial court acted wisely in deferring its action on the question of authority. Furthermore, the trial court, the Court of Appeals, and this Court may properly consider such a matter, regardless of whether the point is made by a party to the cause. *Gage* v. *Bell,* 124 Fed. 371; *Clark* v. *Willett,* 35 Cal. 534; *Standefer* v. *Dowlin,* 22 Fed. Cas. 13284 a.

In *King of Spain* v. *Oliver,* 14 Fed. Cas. No. 7814, where the authority of counsel to commence the suit was challenged, it was said (p. 578):

> It would be strange, if a court whose duty it is to superintend the conduct of its officers, should not have the power to inquire by what authority an attorney of that court undertakes to sue or to defend, in the name of another—whether that other is a real or fictitious person—and whether its process is used for the purpose of vexation or fraud, instead of that for which alone it is intended. The only question can be, as to the time and manner of calling for the authority, and as to the remedy, *which are in the discretion of the court, and ought to be adapted to the case.* (Italics ours.)

McKiernan v. *Patrick,* 4 How. (Miss.) 333. Where the record in the case discloses that the suit was instituted by counsel without authority of the plaintiff named, a court may, and should, take cognizance of the situation and dismiss the case. Such a case is moot. The judgment would bind no one, there being only one party, the defendant, present in court. The same reasoning which induces a court to refuse to proceed to formal judgment and to dismiss a moot case on its own motion, leads to the conclusion that a court on its own motion should decline to proceed to formal judgment and should dismiss a case where it affirmatively appears that the plaintiff named never authorized the suit and

will not be bound by the judgment. We confess we cannot understand the attitude of the Court of Appeals in treating the matter as one in which the court has no interest and will not consider unless raised by one of the parties in a particular way.

A different situation exists where a party is actually in the case and the question is whether the counsel who are acting for him have authority to do so. Here, if there be want of authority, there is no plaintiff, and the judgment would be ineffectual. It is inconceivable that where such a situation is disclosed at any point in the litigation a court will not forthwith refuse to proceed further.

If the law has not heretofore been stated just as we have done, it is time it should be.

The suggestion in the opinion of the Court of Appeals and in petitioner's brief that the point respecting authority of counsel to institute the suit is not in the case, because the trial court in its judgment denied a motion to dismiss and the defendants took no appeal from that judgment, is without merit. In the judgment in which it denied the motion to dismiss, the Supreme Court of the District dismissed the bill on the merits. The defendants were given by the judgment all that and more than they were entitled to.

Neither the Court of Appeals nor the brief of counsel for the petitioner point out how a party may sustain an appeal from a judgment in his favor

which grants more relief than he was entitled to. If an appeal had been taken by the defendant from the judgment, the only error which could have been assigned would have been that the dismissal, instead of being on the merits, should have been without prejudice. An appellant with such an assignment of error would not abide long in a court of appeals.

Although the judgment of the Supreme Court of the District dismissing the suit appears to have been a dismissal on the merits (R. 100), the only ground assigned by the court for its decision was want of authority in counsel to bring a suit in the name of the Pueblo of Santa Rosa (R. 99–100). The court should have dismissed the case without prejudice to any suit which may hereafter be commenced by and with the authority of the alleged Pueblo.

If the Papago Indians ever desire to institute a suit to test the existence of the Pueblo and the nature of their title in these lands, they should not be embarrassed by a plea of *res adjudicata,* with the consequent necessity of then establishing that the name of the Pueblo was used without authority.

CONCLUSION

The case should be remanded to the Supreme Court of the District with instructions to dismiss the bill of complaint on the ground that counsel who instituted the suit had no authority to do so,

and without prejudice to any suit which may hereafter be commenced by and with the authority of the alleged Pueblo of Santa Rosa.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
B. M. PARMENTER,
Assistant Attorney General.
GEORGE A. H. FRASER,
Special Assistant to the Attorney General.
D. V. HUNTER,
Attorney.

JANUARY, 1927.

○